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2
3 **THE THEORY OF SOVEREIGNTY AND THE IMPORTANCE**
4 **OF THE CROWN IN THE REALMS OF THE QUEEN**
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9
10 **A INTRODUCTION**

11 The Crown is legally important because it occupies the conceptual place held by
12 the State in those legal systems derived from or influenced by the Roman civil
13 law.¹ Not only does the Crown provide a legal basis for governmental action, but
14 it also provides much of the legal and political legitimacy for such action.
15 Symbolism can be very important as a source of authority and is not merely
16 indicative of it,² and the Crown is essentially a symbol of government.
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18 The role of the Crown as a legitimizing principle is arguably more evident in
19 New Zealand than in other comparable countries such as Australia and Canada.
20 As a signatory to the Treaty of Waitangi 1840 (which has been described as the
21 founding document of the country), it would appear that the Crown may have
22 acquired a degree of authority which is now independent from its British origins.

23 On another conceptual level, the technical and legal concept of the Crown per-
24 vades the apparatus of government and law in New Zealand, as it has in similar
25 countries. The Crown pervades, to a degree, the whole apparatus and symbolism
26 of government.³ But, at the same time, there is a divergence between orthodox
27 constitutional theory and the modern political reality, in that the trappings of
28 monarchy do not reflect the reality of political power. This is especially note-
29 worthy at a time when the traditional structure of government is being challenged,
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35 ¹ Though the term 'State' is used in popular (and scholarly) writing and there are some instances of
36 official use, it has an uncertain legal meaning in New Zealand except as a synonym for the Crown:
37 S Goldfinch 'The State' in R Miller (ed) *New Zealand Government and Politics* (OUP Auckland 2001).

38 ² J Warhurst 'Nationalism and Republicanism in Australia: The Evolution of Institutions, Citizenship
39 and Symbols' (1993) 28 *Australian J of Political Science* 100; R Collins *Weberian Sociological Theory*
40 (CUP Cambridge 1986).

41 ³ However, it had also been said, in the 19th century, that Great Britain already effectively had a
42 republican form of government: 'Our Monarchy is only a pretence ... only a supernumerary in the
43 pageant': 'The Royalty of the Republic (1851) 1' *The English Republic* 355, 355-56. Parallels to this
44 may be seen in Australia: B Galligan 'Regularising the Australian Republic' (1993) 28 *Australian J*
45 *of Political Science* 56. Even Bagehot emphasized the republican nature of the Constitution, but he
46 laid greater weight on the symbolic role of the Crown: W Bagehot 'The English Constitution' in
47 N St John-Stevans (ed) *The Collected Works of Walter Bagehot* (The Economist London 1974) vol 5.

both by calls in New Zealand for Maori sovereignty or self-government,⁴ and by suggestions for the adoption of a republican form of government.

The Crown is not essential to the legitimacy of government in New Zealand any more than it is in any other country, but it does confer some legitimacy upon the existing regime.⁵ Some appreciation of orthodox constitutional theory is necessary so that one of the bases for political legitimacy may be seen.

This article seeks to identify some of these constitutional theories, and, for illustrative purposes, place them in a New Zealand context. First, it looks at the role of the sovereign as legal head of the executive government. In this, the Crown is the functional head of the executive branch of government. This might be called the practical role of the Crown. The first section of this article will examine the contemporary relevance of this traditional role. It will be argued that this role is important because the Crown retains a practical function as the mechanism through which the daily business of the executive government is conducted.

The second section considers the broader concept of the Crown as the focus of sovereignty. In this respect the Crown is a legal source of executive authority, not simply the means through which government is conducted. But it is not the sovereign who actually rules; rather, the sovereign is the individual in whom is vested executive powers, for the convenience of government. This might be called the legal role of the Crown. This is important because it shows that the Crown retains significant legal powers upon which executive authority is based. Thus, the Crown remains useful as a source of governmental legal authority.

The third section examines some aspects of State theory. The absence of an accepted concept of the State in England has required the Crown to assume the function of source of constitutional authority. This tradition has been followed in New Zealand, which has important consequences, particularly in relation to the Treaty of Waitangi. This might be called the conceptual or symbolic role of the Crown. It is important because the Crown fulfils the function exercised by a State in many other jurisdictions, yet the Crown is not simply a metonym for the State.

B THE SOVEREIGN AS LEGAL HEAD OF THE EXECUTIVE GOVERNMENT

New Zealand statutes have tended to use the terms 'Her Majesty the Queen' and 'the Crown' interchangeably and apparently arbitrarily.⁶ There appears to have been no intention to draw any theoretical or conceptual distinctions between the

⁴ The actual meaning of this term is unclear, and seems perhaps to relate more to self-management than to sovereignty in the 19th century European sense: Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland 24 November 1999).

⁵ W Wade 'The Crown, Ministers and Officials: Legal Status and Liability' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (OUP Oxford 1999).

⁶ 'Sovereign' appears only in the Sovereign's Birthday Observance Act 1952 (NZ). See also M Loughlin 'The State, the Crown and the Law' in Sunkin and Payne (eds) (n 5).

1 terms. This may simply reflect somewhat loose drafting, but it may have its founda-
 2 tion in a lack of certainty felt as much by drafters and members of Parliament,
 3 as by the general public.⁷

4 ‘The Crown’ itself, in British and Commonwealth jurisprudence, is a compara-
 5 tively modern concept.⁸ As Maitland said, the King was merely a man, although
 6 one who did many things.⁹ For historical reasons the King or Queen came to be
 7 recognized in law as not merely the chief source of executive power, but also as the
 8 sole legal representative of the State or organized community.¹⁰

9 According to Maitland, the crumbling of the feudal State threatened to break
 10 down the identification of the King and State, and, as a consequence, Coke recast
 11 the King as the legal representative of the State. It was likely Coke who first attrib-
 12 uted legal personality to the Crown.¹¹ He recast the King as a corporation sole,
 13 permanent and metaphysical.¹²

14 The King’s corporate identity drew support from the doctrine of succession,
 15 which suggested that the King never dies.¹³ It was also supported by the common
 16 law doctrine of seisin, where the heir was possessed at all times of a right to an
 17 estate, even before succession.¹⁴ Blackstone explained that the King ‘is made a
 18 corporation to prevent in general the possibility of an *interregnum*, or vacancy of the
 19 throne, and to preserve the possessions of the Crown entire’.¹⁵

20 Thus the role of the Crown was eminently practical: to hold the executive
 21 power in the land. In the tradition of the common law, constitutional theory was
 22 subsequently developed which rationalized and explained the existing practice—
 23 as, for example, in the development of the law of succession to the Crown.¹⁶

24 Generally, and in order to better conduct the business of government, the per-
 25 manent and undying Crown was accorded certain privileges and immunities not
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27 ⁷ JAD Hayward *In Search of a Treaty Partner: Who, or What, is the Crown?* (PhD thesis Victoria University
 28 of Wellington 1995); Graham Interview (n 4).

29 ⁸ Loughlin (n 6) 36.

30 ⁹ F Maitland ‘The Crown as a Corporation’ (1901) 17 LQR 131.

31 ¹⁰ According to Skinner, the formation of the English State has been primarily a political achievement:
 32 Q Skinner ‘The State’ in T Ball J Farr and RL Hanson (eds) *Political Innovation and Conceptual Change*
 33 (CUP Cambridge 1989). This has also led to a ‘gulf between substance and form’: Loughlin (n 6) 47.

34 ¹¹ Maitland (n 9) 131.

35 ¹² It was as late as 1861 that the House of Lords accepted that the Crown was a ‘Corporation sole’,
 36 having ‘perpetual continuance’: *A-G v Kohler* (1861) 9 HL Cas 654, 671; 11 ER 885, 892.

37 ¹³ ‘It was at the time of Edward IV that the theory was accepted that the king never dies, that the
 38 demise of the Crown at once transfers it from the last wearer to the heir, and that no vacancy’, no
 39 interregnum, ‘occurs at all’: W Stubbs *The Constitutional History of England in Its Origin and Development*
 40 (4th edn Clarendon Press Oxford 1906) vol 2, 107.

41 ¹⁴ H Nenner *The Right to be King: The Succession to the Crown of England, 1603–1714* (Macmillan London
 42 1995) 32.

43 ¹⁵ JT Coleridge (ed) *Blackstone’s Commentaries on the Laws of England* (16th edn Cadell London 1825) vol
 1, 470. That Blackstone was at least partly incorrect can be seen in the development of a concept of
 succession to the Crown without interregnum of the heir apparent. Since this concept had fully
 developed by the time of Edward IV, this cannot have been the principal reason for the develop-
 ment of the concept of the Crown as a corporation sole.

¹⁶ N Cox ‘The Law of Succession to the Crown in New Zealand’ (1999) 7 Waikato L Rev 49.

available to any other legal entity.¹⁷ Blackstone observed that ‘[t]he king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness’.¹⁸ Mathieson has proffered that the Crown may do whatever statute or the royal prerogative authorizes (expressly or by implication) but that it lacks any natural capacities such as an individual or juridical entity may possess.¹⁹

In the course of the 20th century the concept of the Crown has succeeded the King as the essential core of the corporation, which is now regarded as a corporation aggregate rather than a corporation sole.²⁰ In a series of cases in both the United Kingdom and New Zealand, we can see the courts struggling to categorize the nature of the Crown.²¹

In *Re Mason*,²² Romer J stated that it was established law that the Crown was a corporation, but did not indicate whether it was a corporation sole (as generally accepted) or a corporation aggregate (as Maitland argued). Maitland believed that the Crown, as distinct from the King, was anciently not known to the law, but in modern usage had become the head of a ‘complex and highly organised “corporation aggregate of many”—of very many’.²³ In *Adams v Naylor*,²⁴ nearly 20 years later, the House of Lords adopted Maitland’s legal conception of the Crown.²⁵

Although the House of Lords in 1977, in *Town Investments Ltd v Dept of the Environment*,²⁶ accepted that the Crown did have a legal personality, it also adopted the potentially confusing practice of speaking of actions of the executive as being performed by ‘the government’ rather than ‘the Crown’.²⁷ The practical need for this distinction is avoided if one recognizes the aggregate nature of the Crown.²⁸

¹⁷ BV Harris ‘The “Third Source” of Authority for Government Action’ (1992) 108 LQR 626.

¹⁸ *Blackstone’s Commentaries* (n 15) 246.

¹⁹ D Mathieson ‘Does the Crown have Human Powers?’ (1992) 15 NZ Universities L Rev 117. Contrary case law includes: *Sutton’s Hospital Case* [1558–1774] All ER 11, (1613) 10 Co Rep 23a, 77 ER 960 (CP); *Clough v Leahy* (1904) 2 CLR 139 (HCA) 156; *New South Wales v Bardolph* (1934) 52 CLR 455 (HCA) 474; *R v Criminal Injuries Compensation Board* [1967] 2 QB 864, 886; *Malone v Metropolitan Police Comr* [1979] Ch 344, 366; *Quebec v Labrecque* [1980] 2 SCR 1057, 1082; 125 DLR (3d) 545, 564; *Davis v Commonwealth* (1988) 166 CLR 79 (HCA).

²⁰ P Joseph ‘Suspending Statutes Without Parliament’s Consent’ (1991) 14 NZ Universities L Rev 282, 287.

²¹ To the question ‘What is the Crown?’, there have been what Wade calls ‘some extraordinary answers’: Wade (n 5) 23, referring to *Town Investments Ltd v Dept of the Environment* [1978] AC 359 (HL); *M v Home Office* [1992] 1 QB 270 (CA); *M v Home Office* [1994] 1 AC 377 (HL).

²² [1928] 1 Ch 385, 401.

²³ Maitland (n 9) 140.

²⁴ [1946] AC 543 (HL) 555.

²⁵ It has also been accepted by the Supreme Court of Canada: *Verreault v Quebec (A-G)* [1977] 1 SCR 41, 47; 57 DLR (3d) 403, 408; *Quebec v Labrecque* (n 19).

²⁶ *Town Investments* (n 21) 400 (Lord Simon).

²⁷ *ibid* 380–81 (Lord Diplock).

²⁸ Some writers, following *Town Investments*, have preferred the expression ‘government’ rather than ‘Crown’ or ‘State’, eg Harris (n 17) 634–35. The government has never been a juristic entity, so in trying to abandon one legal fiction in *Town Investments*, their Lordships adopted a new one: P Joseph ‘Crown as a Legal Concept (I)’ [1993] NZLJ 126, 129.

1 'The government' is something which, unlike the Crown, has no corporate or
2 juridical existence known to the Constitution. Further, its legal definition is both
3 legally and practically unnecessary.

4 In *Town Investments*, Lord Simon, with little argument, accepted that the Crown
5 was a corporation aggregate,²⁹ as Maitland had believed. This now appears to be
6 in accordance with the realities of the modern State, although at the time it was
7 contrary to the traditional view of the Crown. Thus, the Crown is now seen,
8 legally, as a nexus of rights and privileges, exercised by a number of individuals,
9 officials and departments, all called 'the Crown'.

10 More recently, in *M v Home Office*,³⁰ the English Court of Appeal held that the
11 Crown lacked legal personality and was therefore not amenable to contempt of
12 court proceedings.³¹ But it is precisely because in the United Kingdom's
13 Westminster-style political system there was not the continental-style notion of a
14 State, nor an entrenched Constitution,³² that the concept of the Crown as a legal
15 entity with full powers in its own right arose. *Town Investments* must in any event be
16 regarded as the definitive statement of current English law.

17 The development of the concept of the aggregate Crown from the corporate
18 Crown provided sufficient flexibility to accommodate the reality of government.
19 There was no need to abandon this essential constitutional *Grundnorm*³³ in favour
20 of the very undeveloped and inherently vague concept of 'the government'.³⁴
21 Thus, for reasons principally of convenience, the Crown became an umbrella
22 beneath which the business of government was conducted.

23 The Crown has always operated through a series of servants and agents, some
24 more permanent than others. The law recognizes the Crown as the body by which
25 the business of executive government is exercised.

26 Whether there is a Crown aggregate or corporate, the government is that of the
27 sovereign, and the Crown has the place in administration held by the State in
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29 *Town Investments* (n 21) 400.

30 *M v Home Office* (CA) (n 21).

31 However, in the House of Lords, Lord Templeman spoke of the Crown as consisting of the
32 monarch and the executive, and Lord Woolf observed that the Crown had a legal personality at
33 least for some purposes: *M v Home Office* (HL) (n 21). Some commentators have suggested that the
34 Court of Appeal decision in the case (n 21) might have been the most important case in constitu-
35 tional law in 200 years: Loughlin (n 6) 73.

36 ³² That is, one which claims for itself legal paramountcy, and which limits executive and legislative
37 powers in such a way that the Constitution itself, rather than any institution of government,
38 becomes the focus of critical attention.

39 ³³ In Kelsen's philosophy of law, a *Grundnorm* is the basic, fundamental postulate which justifies all
40 principles and rules of the legal system and from which all inferior rules of the system may be
41 deduced: H Kelsen *General Theory of Norms* M Hartney (tr) (Clarendon Press Oxford 1991);
42 M Hayback *Carl Schmitt and Hans Kelsen in the Crisis of Democracy between World Wars I and II* (DrJur
43 thesis Universität Salzburg 1990).

³⁴ For a critique of these propositions, see generally Joseph (n 28); P Joseph 'The Crown as a Legal
42 Concept (II)' [1993] NZLJ 179; FM Brookfield 'The Monarchy and the Constitution Today: A
43 New Zealand Perspective' [1992] NZLJ 438.

other constitutional traditions.³⁵ The Crown, whether or not there is a resident sovereign, acts as the umbrella under which the various activities of government are conducted, and the representative with whom, in the New Zealand context, the Maori may negotiate as Treaty of Waitangi partner.³⁶ Indeed, in New Zealand the very absence of the sovereign has encouraged this modern tendency for the Crown to be regarded as a concept of government quite distinct from the person of the sovereign.³⁷

The monarchy does, however, have a role beyond the symbolic. In his analysis of the Crown in his own day (1865), Bagehot seriously underestimated its surviving influence. His famous aphorism that a constitutional sovereign has the right to be consulted, to encourage, and to warn,³⁸ can hardly express the residual royal powers of even the late 19th century.³⁹ It may describe the royal powers today, but does not explain why the inherited concept of the supremacy of the Crown should leave the Constitution so centred upon an institution lacking real power.

But Bagehot, like Palmerston and Gladstone, wanted the monarchy relegated to the status of a museum piece, despite the sovereign's 'right to be consulted, to encourage, and to warn'.⁴⁰ This passive role was not that envisaged by George IV, William IV, Victoria or Edward VII, nor that held by the majority of statesmen and textbook writers over this period. The latter felt that the sovereign's role as head of State in a popular parliamentary system had still to be satisfactorily defined, and might well be rather wider than that assigned to it by Bagehot.⁴¹

Dicey and Anson, the leading authorities of their own day, were inclined to advocate a stretching of the royal discretion. To some extent at least, the monarchy appeared to operate at a political level under Edward VII in much the same way as it did under George IV,⁴² though there had been a clear change in the basis of royal authority, which under the former became almost totally dependent upon parliamentary support. But, although instances have been recorded,⁴³ there has been no comprehensive study that offers evidence to show that the exercise by the

³⁵ This concept is alive today, in part as a substitute for a more advanced concept of the Constitution: Graham Interview (n 4).

³⁶ Hayward (n 7).

³⁷ N Cox *The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity* (PhD thesis University of Auckland 2001). In the subtly different situation in the United Kingdom, it has been observed that 'the concept of the Crown cannot be disentangled from the person of the Monarch', straining the legal concept: Loughlin (n 6) 58–59.

³⁸ Bagehot (n 3) 253.

³⁹ F Hardie *The Political Influence of Queen Victoria 1861–1901* (OUP London 1935) 23–27.

⁴⁰ Bagehot (n 3) 253.

⁴¹ The limitations of the distinction between dignified and efficient, so central to Bagehot's model, can be seen in L Jackson *Shadows of the Crown* (PhD thesis University of Chicago 1994).

⁴² HJ Hanham (ed) *The Nineteenth Century Constitution 1815–1914: Documents and Commentary* (CUP Cambridge 1969) 24.

⁴³ R Brazier *Constitutional Practice: The Foundations of British Government* (3rd edn OUP Oxford 1999) 183–204.

1 Crown of the rights to be consulted, to encourage, and to warn has influenced the
2 course of policy.⁴⁴

3 4 5 C THE CROWN AS THE FOCUS OF SOVEREIGNTY

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7 The Crown is more than just the mechanism through which government is admin-
8 istered. It is also itself one of the sources of governmental authority, as a traditional
9 source of legal sovereignty. Not only is government conducted through the Crown
10 (as discussed above), but some governmental authority is derived from the Crown
11 as the legal focus of sovereignty.

12 ‘Sovereignty’, put simply, is the idea that there is a ‘final authority within a given
13 territory’.⁴⁵ But a definition is not enough; an explanation of its role or purpose in
14 a society is arguably more important. Foucault has identified four possible descrip-
15 tions of the traditional role of sovereignty: *a)* a mechanism of power in feudal soci-
16 ety; *b)* a justification for the construction of large-scale administrative monarchies;
17 *c)* an ideology used by one side or the other in the 17th century wars of religion;
18 and *d)* a term used in the construction of parliamentary alternatives to absolutist
19 monarchies.⁴⁶

20 Whichever rationale applied to the embryonic English Crown, the old theory of
21 sovereignty has been democratized since the 19th century into a notion of collec-
22 tive sovereignty exercised through parliamentary institutions. The fundamental
23 responsibility for the maintenance of society itself is much more widely dispersed
24 throughout its varied institutions and the whole population. To some degree this
25 equates to the concept of the aggregate Crown, favoured by the more recent
26 jurists.⁴⁷

27 But the concept of sovereignty, however understood, is especially important
28 because it has become part of the language of claims by indigenous people, as in
29 New Zealand, where Maori claims are based on the conflicting concept of *tino ran-*
30 *gātiratanga*, or chiefly authority.⁴⁸ The particular problems this causes in New
31 Zealand cannot be examined here, but, briefly, claims based on the Maori concept
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34 ⁴⁴ D Smith ‘Bagehot, the Crown, and the Canadian Constitution’ (1995) 28 Canadian J of Political
35 Science 622. An example of the use of influence through an ‘exchange of views’ has been given in
36 K Rose *Kings, Queens and Courtiers: Intimate Portraits of the Royal House of Windsor from its Foundation to the*
37 *Present Day* (Weidenfeld & Nicolson London 1985) 92.

38 ⁴⁵ F Hinsley *Sovereignty* (CUP Cambridge 1986) 1; S Krasner ‘Sovereignty’ (1988) 21 Comparative
39 Political Studies 86.

40 ⁴⁶ cf M Foucault ‘Governmentality’ in G Burchell C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press Chicago 1991) 97–98, 101–102; D Held
41 *Political Theory and the Modern State* (Polity Press Cambridge 1989) 216–25.

42 ⁴⁷ cf Joseph (n 20) 287; W Wade and C Forsyth *Administrative Law* (8th edn OUP Oxford 2000) 798–99;
43 *Halsbury’s Laws of England* (4th edn Butterworths London 1996 reissue) vol 8(2) [353].

⁴⁸ PG McHugh ‘Constitutional Theory and Maori Claims’ in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (OUP Auckland 1989) 25.

of *tino rangatiratanga* represent the claims of an antecedent regime to survival despite apparently ceding sovereignty to the Crown in the Treaty of Waitangi. Indeed, it is significant that most talk of ‘sovereignty’ in the second half of the 20th century has concentrated on the sovereignty of racial groups, and particularly, the so-called indigenous peoples.⁴⁹

Sovereignty has assumed different meanings and attributes according to the conditions of time and place, but at a basic level it requires obedience from its subjects and denies a concurrent authority to any other body.⁵⁰ In New Zealand and elsewhere, the sovereign is formally responsible for the executive government, and indeed is specifically so appointed by the Constitutions of most Commonwealth countries of which Her Majesty is head of State.⁵¹

It will be immediately apparent that there is a divergence between abstract law and political reality, for substantial political power lies with politicians rather than the sovereign. Political orthodoxy also appears to hold that for a Constitution to be legitimate, it must derive from the people. Yet, the New Zealand Constitution is not apparently based legally on the sovereignty of the people, but rather on that of the Queen-in-Parliament.

In the Westminster tradition, it is Parliament, in contrast to the Crown, which is widely regarded as being the focus of political power.⁵² Joseph assumed therefore that it is the people, rather than Parliament, that is sovereign.⁵³ But it would seem that sovereign authority is legally vested in the Crown-in-Parliament, and politically in the people. Legally, this can be seen as less than ideal, or even confused. However, a Constitution is more than merely a legal structure.⁵⁴

The authority of government is based upon several sources. Even if authority were legally derived from the people, as it appears now to be in Australia,⁵⁵ it is not clear how the position of the Maori people of New Zealand can be recon-

⁴⁹ E Lauterpacht ‘Sovereignty’ (1997) 73 *Intl Affairs* 137.

⁵⁰ D Philpott ‘Sovereignty’ (1995) 48 *J of Intl Affairs* 353.

⁵¹ eg Constitution of Barbados 1966 s 63(1): ‘The executive authority of Barbados is vested in Her Majesty’.

⁵² A Kornberg and H Clarke *Citizens and Community: Political Support in a Representative Democracy* (CUP Cambridge 1992); C Harlow ‘Power from the People? Representation and Constitutional Theory’ in P McAuslan and J McEldowney (eds) *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey’s Law of the Constitution* (Sweet & Maxwell London 1985); JR Mallory ‘The Appointment of the Governor General: Responsible Government, Autonomy and the Royal Prerogative’ (1960) 26 *Canadian J of Economics and Political Science* 96.

⁵³ P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co Sydney 1993) 284–85.

⁵⁴ This is particularly so in respect of what might be called policy legacies: *T Skocpol States and Social Revolution* (CUP Cambridge 1979) 27. Indeed, a Constitution exists in the imagination of those who create it, use it, and thus know it: J Jacob *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996) 6.

⁵⁵ The Australian Constitution 1900 has been held to be based on popular sovereignty, as it was adopted by popular vote and may only be changed by referendum: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (HCA) 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (HCA) 171 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140 (HCA) 230, 237 (McHugh J).

1 ciled,⁵⁶ in particular, the preservation of their *tinu rangatiratanga*, or chiefly authority.
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The origins and nature of constitutional authority, whether in a monarchy or a republic, are important. But although a Constitution can say, as does that of Papua New Guinea, that it is derived from the popular sovereignty of the people,⁵⁸ this may be confusing legal authority with political authority.⁵⁹ Where the Crown exists, and no formal entrenched Constitution has been adopted, difficult questions of the basis of governmental authority can be avoided.

There has been to date comparatively little theoretical analysis of the conceptual basis of governmental authority in New Zealand.⁶⁰ There has been much discussion focused on the legitimacy of government derived from the Treaty of Waitangi.⁶¹ But there has been little work done towards an understanding of the nature of governmental authority in New Zealand, except by those who argue that there is too much (or too little) involvement of government in individual lives.⁶² This dearth of work may be due to apathy,⁶³ but it could also be influenced by an underlying suspicion of abstract theory which can be traced in the British tradition of political thought from the 17th century, if not earlier.⁶⁴

In Canada, by contrast, there have been several major studies of the conceptual basis of government. In particular, in 1985 the Law Reform Commission of

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⁵⁶ Canada has the same type of conceptual difficulty: P Russell *Constitutional Odyssey: Can Canadians Be a Sovereign People?* (University of Toronto Press Toronto 1992).

⁵⁷ 'The [Australian Labor Party] want[ed] a republic partly for symbolic nationalist reasons, but partly also to deprive governors-general of their association with royal legitimacy': R Lucy *The Australian Form of Government* (Macmillan Melbourne 1985) 17.

⁵⁸ This is particularly so in respect of what might be called policy legacies: T Skocpol *States and Social Revolution* (CUP Cambridge 1979) 27. Indeed, a Constitution exists in the imagination of those who create it, use it, and thus know it: J Jacob *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996) 6.

⁵⁹ See H Laski 'The Theory of Popular Sovereignty' (1919) 17 *Michigan L Rev* 201.

⁶⁰ Indeed, it has been said that few care for such esoteric matters: Graham Interview (n 4).

⁶¹ eg FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (University of Auckland Press Auckland 1999); A Sharp *Leap into the Dark: The Changing Role of the State in New Zealand since 1984* (Auckland University Press Auckland 1994); A Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (2nd edn OUP Auckland 1997); R Mulgan 'Can the Treaty of Waitangi Provide a Constitutional Basis for New Zealand's Political Future?' (1989) 41 *Political Science* 51.

⁶² eg J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993); R Mulgan *Democracy and Power in New Zealand: A Study of New Zealand Politics* (2nd edn OUP Auckland 1989).

⁶³ This is what former Prime Minister David Lange believed: Interview with David Lange, former Prime Minister of New Zealand (Auckland 20 May 1998).

⁶⁴ M Foley *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge London 1989). The wars of the 17th century were, to no small degree, between competing conceptions of the State and engendered a suspicion for such speculation. It is probable that the long dominance of Whig ideology also contributed to this attitude.

Canada released a working paper which called for a re-examination of the concept of the federal Crown in Canadian law.⁶⁵ The working paper called for the recognition of a unitary federal administration in place of the legal concept of the Crown. It specifically asked to what extent Canada should retain the concept of the Crown in federal law and whether Canada should replace the concept of Crown with the concept of State or federal administration.

The Commission briefly described what it termed the chaotic and confusing historical treatment of 'the Crown' in English and Canadian law. But historical inconsistencies and contradictions in the treatment of the concept of the Crown cannot and need not be rationalized. Judges, legislators and writers are not always talking about the same thing. They may mean the sovereign herself, the institution of royal power, the concept of sovereignty, the constitutional head of State, or judicial instructions and actors.

To recognize political reality, the authors of the working paper suggested that the concept of the Crown should be abolished, and the sovereign relegated to the status of constitutional head of State.⁶⁶ Discarding monarchical terminology and limiting the Crown to its purely formal role would, in the opinion of the Commission, 'reduce terminological confusion, historical biases, and anti-democratic and non-egalitarian concepts so far as they affect individuals in the relationships between bureaucrats and the majority'.⁶⁷ The Crown would be replaced by the 'administration'. Thus, the authors of the working paper wanted to recognize the executive branch of the State.⁶⁸ Others have also considered the legal nature of the Crown or State in Canada, but the issue is not yet settled.⁶⁹

Cohen believed that the methodology of the working paper was flawed because it focused on theoretical and abstract analyses of the State.⁷⁰ Essentially, the difficulty is that there is no developed concept of the State nor of the nation in Commonwealth constitutional theory.⁷¹ It is equally true that modern theoretical

⁶⁵ Law Reform Commission of Canada *The Legal Status of the Federal Administration* (Working Paper No 40, 1985).

⁶⁶ The King of Sweden, for instance, has been so relegated: Constitution of Sweden 1975. Note that the Canadian Law Reform Commission's paper (n 65) spoke of the Crown as an institution, rather than of the person or representatives of the sovereign.

⁶⁷ D Cohen 'Thinking about the State: Law Reform and the Crown in Canada' (1986) 24 *Osgoode Hall LJ* 379, 379.

⁶⁸ In effect, they espoused a republican form of government.

⁶⁹ PW Hogg *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Law Book Co Sydney 1971); Law Reform Commission of British Columbia *Legal Position of the Crown* (Working Paper No 7, 1972); D Smith 'Empire, Crown and Canadian Federalism' (1991) 24 *Canadian J of Political Science* 451, 471.

⁷⁰ Cohen (n 67).

⁷¹ W Moore 'Liability for Acts of Public Servants' (1907) 23 *LQR* 12; P Cobbett '“The Crown” as Representing “The State”' (1903) 1 *Commonwealth L Rev* 23, 30; HT Postle 'Commonwealth and Crown' (1929) 3 *Australian LJ* 109; H Laski 'The Responsibility of the State in England' (1919) 32 *Harvard L Rev* 447, 472; Maitland (n 9) 136. Moore attributes this to parliamentary mistrust inspired by the association between civil law and Baconian theory: W Moore 'Law and Government' (1905) 3 *Commonwealth L Rev* 205.

1 studies of the State have been limited even in continental Europe.⁷² But the mod-
 2 ern concept of the State has been described as a critical subject of enquiry.⁷³

3 In New Zealand, like in Canada, executive authority is formally vested in the
 4 Crown.⁷⁴ The government does not require parliamentary approval for most
 5 administrative actions. Nor need it show popular approval or consent for these
 6 actions—though the rule of law, political expediency, and the strictly limited range
 7 of powers held by the Crown prevent authoritarian Crown government.⁷⁵

8 The executive authority of a country could be vested in a president, the
 9 Governor-General, or the Queen, irrespective of the basis of sovereignty. But in
 10 New Zealand's constitutional arrangements the sole focus of legal authority is the
 11 Crown-in-Parliament. This institution enjoys full legal sovereignty or supremacy.
 12 The Crown itself is allocated executive functions, and, within a limited field,
 13 requires no legal authority other than its own prerogative.⁷⁶

14 This approach has the advantage of simplicity, leaving broader questions of sov-
 15 ereignty unanswered.⁷⁷ As such it owes much to the British tradition of a
 16 Constitution as something which evolves, and for which theory is sometimes devel-
 17 oped subsequent to the practice.⁷⁸ One aspect of this paucity of theory, if it may
 18 be so called, is the weakness—or absence—of a general theory of the State.⁷⁹

19 In Canada, problems related to the place of the French-speaking minority and
 20 the federal nature of the country meant that difficult questions of the location and
 21 nature of governmental authority had to be addressed. Thus, claims by Quebec
 22 for special status within the federation required an analysis of the nature of power
 23 exercised by federal and provincial governments. The existence of an entrenched
 24 Constitution also meant that the Constitution could substitute for the Crown, as
 25 in the United States of America, as a conceptual focus of government.

26 Clarke argues that in Canada the marriage of the parliamentary form of govern-
 27 ment to the federal principle makes the determination of legislative authority prob-
 28 lematic, at least in part, because it fails to develop an adequate conceptualization of
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30 ⁷² J Dearlove 'Bringing the Constitution Back In: Political Science and the State' (1989) 37 Political
 31 Studies 521.

32 ⁷³ Loughlin (n 6) 40.

33 ⁷⁴ Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225) cl
 34 III(a).

35 ⁷⁵ For an example of the application of such limits on government see *Fitzgerald v Muldoon* [1976] 2
 36 NZLR 615 (NZ HC).

37 ⁷⁶ Harris (n 17).

38 ⁷⁷ This suits most political leaders and the general public alike: Graham Interview (n 4).

39 ⁷⁸ By contrast, Australia's Constitution may be described as a social covenant drawn up and ratified
 40 by the people: JA La Nauze *The Making of the Australian Constitution* (Melbourne University Press
 41 Melbourne 1972).

42 ⁷⁹ The sovereignty of the Crown is not merely a legal fiction, as Bercuson argued, since it has practi-
 43 cal consequences, including a measure of public perception as a source of authority: D Bercuson
 and B Cooper 'From Constitutional Monarchy to Quasi Republic' in J Ajzenstat (ed) *Canadian
 Constitutionalism, 1791–1991* (Canadian Study of Parliament Group Ottawa 1992); cf D Smith *The
 Republican Option in Canada, Past and Present* (University of Toronto Press Toronto 1999) 18–19;
 Graham Interview (n 4).

sovereignty. In the absence of a better understanding, authority is described merely in terms of a division of power.⁸⁰

There have been neither technical nor practical reasons for these difficult questions regarding the sources of governmental authority to be answered in New Zealand. To some extent, the asking of such questions has also been avoided.⁸¹ Thus, the existence of the Crown, whilst providing a convenient legal source for executive government, has also acted as an inhibitor of abstract constitutional theorizing. As a consequence, in Laski's view, the Crown has covered a 'multitude of sins'.⁸² Loughlin also has described the Crown as a poor substitute for the State because of the public and private aspects of the sovereign's responsibilities.⁸³ Whilst this might not be desirable, it provides a convenient cover behind which the business of government is conducted, unworried by conceptual difficulties.

D STATE THEORY

The principal reason why the Crown has been regarded as a legal source of executive authority is historical. Not only is the Crown a source of legal authority, but it also serves to personify the political community. Thus the legal role of the Crown is important at three conceptual levels. First, and most fundamentally, it is a metonym for State. Secondly, it is a source of legal authority. And thirdly, it is the means through which government is conducted. In most political systems executive power and the State are synonymous. The State may be classified as that which refers to some or all of the legal, administrative or legislative institutions operating in a community.⁸⁴ In the British system, and those derived from it, it is questionable whether there is a State.⁸⁵ Most legal commentators have traditionally given it little treatment, or simply answered in the negative. Political scientists have considered the question from a different perspective, though not one which is necessarily any more complete.⁸⁶

⁸⁰ GE Clarke *Popular Sovereignty and Constitutional Reform in Canada* (MA thesis Acadia University 1997).

⁸¹ Such questions were avoided, at least, by Pakeha (the commonly used Maori name for non-Maori New Zealanders of European descent). Maori showed a greater willingness, if only because they saw thereby a means of increasing their share of authority: Interview with Hon Georgina te Heuheu, former Associate Minister in Charge of Treaty of Waitangi Negotiations (Auckland 7 December 1999).

⁸² Laski (n 71) 447.

⁸³ Loughlin (n 6) 33.

⁸⁴ Held (n 46); JR Strayer *On the Medieval Origins of the Modern State* (Princeton University Press Princeton 1970).

⁸⁵ Exceptions are found in those countries, such as the USA, that have been compelled to address this often difficult issue because of the republican and federal nature of their government.

⁸⁶ B Sussler *Approaches to the Study of Politics* (Macmillan New York 1992) 180. In recent decades State-centred theorists have sought to bring the State back, arguing that it is more autonomous than society-centred theorists have claimed. As Bogdanor found, it is necessary to range across law, politics, and history to understand a historic constitution: V Bogdanor *The Monarchy and the Constitution* (Clarendon Press Oxford 1995).

1 The character of communities in the central middle ages was rooted in older
 2 traditions than those created by the study of Roman and canon law, which was the
 3 basis for much later conceptualizations of the State in continental Europe.⁸⁷ Nor
 4 did the rediscovery of Aristotle, the development of modern government,⁸⁸ or
 5 demographic and economic changes significantly affect them. The traditional
 6 bonds of community owed much to ties of kinship, much to loyalties of war-bands,
 7 very much to Christianity, and, perhaps most strongly, to legal practices and val-
 8 ues.⁸⁹ In these communities the King was the representative of the people to
 9 whom his people owed allegiance, and who, in turn, was held responsible for the
 10 government.⁹⁰

11 Hobbes, along with Bodin, Machiavelli and Hegel, did much to stimulate
 12 European State theory, a theory which has not since been fully reconsidered in the
 13 context of the British Constitution. Hobbes's *Leviathan* (1651) was perhaps the
 14 greatest piece of political philosophy written in the English language. Like
 15 Machiavelli's *The Prince* (1532), it offered a dramatic break with the usual apologies
 16 for the Christian feudal State of the middle ages.

17 The modern territorial State, the concept of political absolutism, and the prin-
 18 ciple of *quod principi placuit, legis nabet vigorem* (what hath pleased the prince has the
 19 force of law) spelt the end of the medieval nexus of rights and duties, counterbal-
 20 anced powers, and customs. Hobbes excluded religion as a source of morality, and
 21 based ethical values, as well as political theory, on the human impulse toward self-
 22 preservation.⁹¹ The reality of early modern government throughout Europe was
 23 that it was essentially driven by political realists who sought the centralization of
 24 power for the good of the country.⁹²

25 Since the modern State inherited the papal (and imperial) prerogative, it must,
 26 then, govern all within the geographical confines of the country. Speculation in
 27 France was centred on a sovereign State with a royal organ to declare its sovereign
 28 purposes. This regime collapsed because in 18th century France the political and
 29 social atmosphere was similar to that which had caused such profound changes in
 30 England a century earlier.

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 33 ⁸⁷ E Kantorowicz 'Kingship under the Impact of Scientific Jurisprudence' in M Clagett and others
 34 (eds) *Twelfth Century Europe and the Foundations of Modern Society* (University of Wisconsin Press Madison
 35 1961) 89.

36 ⁸⁸ Strayer (n 84).

37 ⁸⁹ S Reynolds 'Law and Communities in Western Christendom, c. 900–1140' (1981) 25 *American J*
 38 *of Legal History* 205, 206.

39 ⁹⁰ Dark age Kings were expected to hold fast the territory of their own communities, to master or con-
 40 quer their neighbours, and to protect their own people and enable them to live securely:
 41 Kantorowicz (n 87) 89–111.

42 ⁹¹ T Hobbes *Leviathan* (1651) (Collier New York 1962); Q Skinner 'Conquest and Consent: Thomas
 43 Hobbes and the Engagement Controversy' in GE Aylmer *The Interregnum: The Quest for Settlement*
 44 *1640–1660* (Macmillan Press London 1972).

45 ⁹² This is typified in Machiavelli; N Machiavelli *The Prince* Q Skinner and R Price (eds) (CUP
 Cambridge 1988).

Inspired by the political changes in England, and in part directed by the theories such as those of Rousseau⁹³ and Montesquieu,⁹⁴ the French people had become the masters of the State. This example was followed elsewhere in the course of the 19th century, though usually with less violence.⁹⁵

However, for two interrelated reasons, the State never became a legal concept in English law. Most countries have a date at which they can be said to have begun their constitutional existence, but not the United Kingdom.⁹⁶ The need to create (or recreate) a concept of the State has not been generally felt since 1688,⁹⁷ and even then the feeling was half-hearted.⁹⁸ Nor was there a general reception of the Roman civil law, which would have brought its concept of the State. The common law was always happier developing theories to describe the realities of the law, rather than moulding the law around abstract theories.⁹⁹ ‘The supreme executive power of this kingdom’, as Blackstone knew,¹⁰⁰ was vested in the King,¹⁰¹ and there the matter was allowed to rest.

As a consequence of this jurisprudential weakness, if it can be so called, there has been in the Commonwealth (except perhaps in Canada) comparatively little thought given to theories of the structure of the State. In particular, there has been little consideration of the theory of government in New Zealand beyond questions of ‘State responsibility’ and the proper role of the State.¹⁰² Yet, the history of this country, and in particular, the Treaty of Waitangi, makes this a curious deficiency.¹⁰³

⁹³ He argued for a version of sovereignty of the whole citizen body over itself: J-J Rousseau *The Social Contract and Other Later Political Writings* V Goureaux (tr) (CUP Cambridge 1997).

⁹⁴ He outlined what he believed was the equilibrium of the British political system, which he compared to the French—to the disadvantage of the latter: C Montesquieu ‘The Spirit of the Laws’ in A Lijphart (ed) *Parliamentary versus Presidential Government* (OUP Oxford 1992) 48.

⁹⁵ H Laski *Authority in the Modern State* (Yale University Press New Haven 1919) 21–24.

⁹⁶ The United Kingdom can, of course, be dated to the Union with Ireland Act 1800 (UK) 39 & 40 Geo 3 c 67. British constitutional law has been essentially that of England—although not without dispute: ‘Pretensions of English Law as “Imperial Law”’ in T Smith (ed) *The Laws of Scotland* (Law Society of Scotland Edinburgh 1987) vol 5 [711]–[719].

⁹⁷ However, in recent decades there have been some movements in this direction, for legal rather than political reasons: Jacob (n 54).

⁹⁸ V Bogdanor ‘Britain and Europe’ in R Holme and M Elliott (eds) *1688–1988: Time for a New Constitution* (Macmillan London 1988) 81.

⁹⁹ H Lévy-Ullmann *The English Legal Tradition: Its Sources and History* F Goadby (ed) M Mitchell (tr) (Macmillan London 1935) xlvi–liii.

¹⁰⁰ *Blackstone’s Commentaries* (n 15) 190.

¹⁰¹ ‘[T]he Queen’s most excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil’: *The Canons of the Church of England* (SPCK London 1969) Canon A7; *Thirty-Nine Articles of Religion* (London 1562 confirmed 1571) art 37.

¹⁰² Kelsey (n 62), for example, speaks of ‘the State’ where constitutional lawyers would traditionally speak of ‘the Crown’, or some political scientists ‘the government’. See also Sharp 1994 (n 61).

¹⁰³ Perhaps this is not so curious given the uncertainty felt by many Maori about the scope of *kawanatanga* and *tino rangatiratanga*: Graham Interview (n 4).

1 Since the 1980s, however, there has been more consideration given in New
 2 Zealand to the more abstract notions of governmental authority.¹⁰⁴ Inspired by
 3 the predominantly neo-liberal market-economy reforms initiated by the 1984
 4 Labour Government,¹⁰⁵ commentators have seen a resurgence of the State as a
 5 subject worthy of serious study.¹⁰⁶ In the writings of Mulgan¹⁰⁷ and Sharp,¹⁰⁸ for
 6 example, are seen the formulation of new conceptions of the State—although not
 7 ones which necessarily have much direct influence on politicians or the general
 8 public. The disputes between neo-liberals,¹⁰⁹ pluralists,¹¹⁰ feminists,¹¹¹
 9 Marxists,¹¹² and others in the 1980s and 1990s¹¹³ have, however, begun a process
 10 towards developing a comprehensive theory of government.

11 Few of these studies have considered the Crown as an entity of government.
 12 The ideological dominance of neo-liberalism may be in part responsible for this,
 13 for whatever its advantages and disadvantages, neo-liberalism is largely ahistori-
 14 cal. Pluralism, at least in its classical form, considers more fully the historical evo-
 15 lution of governmental institutions,¹¹⁴ and this is critical to an understanding of
 16 the Crown.

17 Jacob has postulated that the notion of the State has now begun to evolve in
 18 Britain as a consequence of the development of public law in place of an empha-
 19 sis on Crown immunities.¹¹⁵ His thesis is that since the Franks Report and the con-
 20 sequent Tribunals and Inquiries Act 1958 (UK) 6 & 7 Eliz 2 chapter 66, judicial
 21 activism has developed an embryonic State.¹¹⁶

22 This has, so the argument goes, been due to the increasingly common platform
 23 between those politicians who desire to ‘roll back’ the frontiers of the State,¹¹⁷ or
 24 at least place their emphasis on individual rights, and the attitude of judges assert-
 25 ing the inherent power of the common law. It has not been fashioned out of a
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28 ¹⁰⁴ eg ‘Building the Constitution’ conference held in Wellington in 2000: C James (ed) *Building the*
 29 *Constitution* (Victoria University of Wellington Institute of Policy Studies Wellington 2000).

30 ¹⁰⁵ Goldfinch (n 1) 516n17.

31 ¹⁰⁶ See eg the chapters devoted to the various interpretations of the State in *ibid.*

32 ¹⁰⁷ Mulgan (n 62).

33 ¹⁰⁸ Sharp 1994 (n 61).

34 ¹⁰⁹ J Morrow ‘Neo-Liberalism’ in Miller (ed) (n 1).

35 ¹¹⁰ R Mulgan ‘A Pluralist Analysis of the New Zealand State’ in B Roper and C Rudd (eds) *State and*
 36 *Economy in New Zealand* (OUP Auckland 1993).

37 ¹¹¹ R Du Plessis ‘Women, Politics and the State’ in C Rudd and B Roper (eds) *The Political Economy of*
 38 *New Zealand* (OUP Auckland 1997).

39 ¹¹² C Dixon ‘Marxism’ in Miller (ed) (n 1).

40 ¹¹³ Sharp 1994 (n 61); Kelsey (n 62); P Moloney ‘Pluralist Theories of the State’ in Miller (ed) (n 1).

41 ¹¹⁴ Moloney (n 113).

42 ¹¹⁵ M Freedland ‘The Crown and the Changing Nature of Government’ in Sunkin and Payne (eds)
 43 (n 5).

¹¹⁶ Jacob (n 54). It has also been said that in the course of the 20th century the Crown lost many tra-
 ditional immunities, particularly as a consequence of the evolution of the concept of public law,
 through limits on the royal prerogative and Crown privileges, and through the growth of public
 interest: Loughlin (n 6) 66.

¹¹⁷ See Kelsey (n 62).

desire for centralized power. It was, according to Jacob, 'both judicially and politically created in order to limit it'.¹¹⁸

Modern Anglo-American constitutional theory is preoccupied with the problem of devising means for the protection and enhancement of individual rights in a manner consistent with the democratic basis of our institutions. In the United Kingdom, the focus is on the need for, or the advisability of, imposing restraints on the legislative sovereignty of Parliament.

But it would be precipitant to claim the development of a State in either New Zealand or the United Kingdom. More in keeping with the tradition of historical development¹¹⁹ would be an acceptance of the evolution of a new form of aggregate Crown, one in which the distinction between person and office is increasingly great.¹²⁰

Allegedly right-wing elements in New Zealand opposed the use of the term 'State' and sought alternatives, such as the pre-existing concept of the Crown, not because of any attachment to monarchy, but because of opposition to anything evocative of interventionist government.¹²¹ In part due to the neo-liberal attempt to 'roll back the State', there was also a corresponding weakening of the legal status of the Crown in late 20th century New Zealand.¹²² However, there has been some work done on the Crown in its role as signatory of the Treaty of Waitangi, some of which has led to tentative discussion of concepts of government.¹²³ It is in this symbolic role that the modern function of the Crown appears to lie.

It may be that the sovereign lacks personal power, but the organs of royal government, whether they are ministers or departments, enjoy the benefit of the residual power of the Crown as an institution in which the *maiestas* of law and government is vested. This institution is more important than the person of the sovereign.¹²⁴ The Crown can be seen as a living thing, personified by the Queen and the Governor-General, and distinct from any obscure concept of governmental State. This was the basis of Bagehot's analysis of the British Constitution,¹²⁵ and it remains important in New Zealand today. The exact definition of the Crown may at times be uncertain, but it has the advantage over the State of being the

¹¹⁸ Jacob (n 54) 24.

¹¹⁹ This evolutionary and legalistic approach has been remarked upon regularly by continental European observers: Lévy-Ullmann (n 99).

¹²⁰ This is a conclusion in accordance with the findings of Hayward (n 7).

¹²¹ G McLauchlan 'Of President and Country' *New Zealand Herald* (Auckland New Zealand 17 February 1995) 8.

¹²² Joseph (n 28); Joseph (n 34); Kelsey (n 62).

¹²³ Hayward (n 7); M Wilson 'The Reconfiguration of New Zealand Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality' (1997) 5 *Waikato L Rev* 17.

¹²⁴ There was a real interregnum between the death of one king and the election and coronation of another. The hereditary right to be considered eventually became the right to be elected. As the conception of hereditary right strengthened the practical inconvenience of the interregnum was curtailed: F Maitland and F Pollock *History of English Law before the Time of Edward I* (CUP Cambridge 1895) vol 1, 506.

¹²⁵ Bagehot (n 3) 203.

1 structure of government which is actually utilized in New Zealand, and therefore
2 it is somewhat better known, if not well understood.

3 In both Canada and Australia, the existence of entrenched Constitutions has
4 resulted in at least a partial shifting of emphasis from the Crown to the written
5 Constitutions. Indeed, revolutionary necessity required this in the United States of
6 America more than 200 years ago.¹²⁶ But the technical and legal concept of the
7 Crown continues to pervade the apparatus of government and law in New
8 Zealand.

9 No new generally accepted theory of government has been postulated in New
10 Zealand, nor would such a project be likely to attract the attention which it
11 deserves. In so far as such matters have been considered, the focus has been on the
12 sovereignty or supremacy of Parliament, and the possibility that there may be lim-
13 its to such sovereignty.¹²⁷ For Dicey, sovereignty of Parliament was matched by
14 the rule of law, or supremacy of law.¹²⁸

15 Political sovereignty may lie in practice with the people,¹²⁹ but legally this is less
16 certain, although legitimacy derives principally from the people. Indeed, as a
17 Constitution characterized by its uncodified (or 'unwritten') nature, the New
18 Zealand Constitution cannot be anything but a traditional evolutionary Burkean
19 type.¹³⁰ Yet, whether this remains the basis of the Constitution is uncertain for two
20 major reasons.

21 First, the non-Maori population of New Zealand seems, by and large,
22 influenced by basically Lockean ideas of government as a direct compact.¹³¹
23 Though they may not directly question the basis of governmental authority, the
24 possibility of such questioning in the future cannot be discounted. This is particu-
25 larly so given the impetus to reform given by the introduction of a system of pro-
26 portional voting in 1996.¹³²

27 By contrast, Maori tend to see government, and society, in more evolutionary
28 terms.¹³³ Most importantly, however, claims to Maori sovereignty do not rest
29 upon claims to popular sovereignty as such, but upon the cession or non-cession
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32 ¹²⁶ Historical continuity characterizes the Constitutions of the United Kingdom and the 'old domin-
33 ions': Loughlin (n 6) 43–44.

34 ¹²⁷ This question has been called 'the most puzzling constitutional conundrum of all': A Sharp
35 'Constitution' in Miller (ed) (n 1) 40; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (NZ CA)
36 398 (Cooke J).

37 ¹²⁸ The courts would supervise the exercise of a common law power of government, as in *The Trial of*
38 *Theobald Wolfe Tone* [*Wolfe Tone's case*] (1798) 27 State Tr 614.

39 ¹²⁹ Laski (n 59).

40 ¹³⁰ Edmund Burke saw a Constitution as based on a social contract which evolved from generation to
41 generation: Russell (n 56) 10–11.

42 ¹³¹ The Prince of Wales was reported as believing that a referendum on the monarchy in the United
43 Kingdom would provide a new and lasting legitimacy for the Crown: 'Prince wants British to
44 Choose' *New Zealand Herald* (Auckland New Zealand 8 November 1999) B1.

45 ¹³² A Simpson (ed) *The Constitutional Implications of MMP* (School of Political Science and International
46 Relations Victoria University of Wellington Wellington 1998).

47 ¹³³ D Awatere *Maori Sovereignty* (Broadsheet Auckland 1984).

of *kawanatanga*¹³⁴ and *tino rangatiratanga*¹³⁵ to the Crown in 1840. The sovereignty of the Crown, in the context of the Treaty of Waitangi, is more than merely a legal doctrine; it has a continuing political relevance. Merely redefining the location of sovereignty as the people, a reconstituted Parliament, or a President, would not necessarily satisfy the other party to the Treaty, for it would constitute the removal of one party to the Treaty.¹³⁶ The difficulty remains to determine what constitutional structures will satisfy both perspectives.¹³⁷

E CONCLUSION

This article has examined the thesis that the Crown in New Zealand (and other countries which acknowledge Elizabeth II as Queen) is legally important because it holds the conceptual place which, in those legal systems derived from or influenced by the Roman civil law, is held by the State. This is because the Crown provides a legal basis for governmental action, and because it provides much of the legal and some of the political legitimacy for such action.

The starting point for the examination of this legal legitimacy is the role of the sovereign as legal head of the executive government, which might be called the practical role of the Crown. In this, the Crown retains a practical role as the mechanism through which executive government is conducted.

But the broader concept of the Crown as the focus of sovereignty is also important, and arguably more so since the Crown has become increasingly devoid of real political power during the course of the 20th century.¹³⁸ The Crown is a legal source of executive authority. But it is not the sovereign who actually rules; rather the sovereign is the individual in whom executive powers are vested, for the convenience of government. This has arguably led to a jurisprudential weakness, a

¹³⁴ *Kawanatanga* could be taken as 'a distant power of protection against foreigners and other tribes, which would not impinge on the mana of individual chiefs and their own tribes': Mulgan (n 61) 56.

¹³⁵ This was reserved by the chiefs by art 2 of the Treaty of Waitangi. Sir Hugh Kawharu, Professor of Maori Studies at the University of Auckland, observed in evidence to the Waitangi Tribunal: '[W]hat the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death': *Report of the Waitangi Tribunal on the Kaituna River Claim* (Waitangi Tribunal Wellington 1984) 14. The leading Maori lawyer, Moana Jackson, proposes a markedly different view: 'So, what Maori people did, in Article One, was grant to the Crown the right of *kawanatanga* over the Crown's own people, over what Maori called "nga tangata whai muri", that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its *kawanatanga* over all European settlers, but the authority to control and exercise power over Maori stayed where it had always been, with the *iwi*.': M Jackson 'Maori Law' in R Young *Mana Tiriti: The Art of Protest and Partnership* (Haeata Project Waitangi/City Art Gallery/Daphne Brasell Associates Press Wellington 1991) 19.

¹³⁶ See Hayward (n 7).

¹³⁷ J Phillips 'The Constitution and Independent Nationhood' in C James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies Wellington 2000).

¹³⁸ The increased symbolic role is emphasized in Bogdanor (n 86).

1 point made strongly in a Canadian report on the legal structure of the federal
2 administration.¹³⁹

3 At the most abstract level, the absence of an accepted concept of the State in
4 England required the Crown to assume the function of source of governmental
5 authority. This might be called the conceptual or symbolic role of the Crown. This
6 tradition has been followed in New Zealand, as it has everywhere the Crown has
7 been established. This conceptual basis for government is important because the
8 Crown fulfils the function exercised by a State in many other jurisdictions, yet the
9 Crown is not simply a metonym for the State. This has important consequences,
10 particularly in relation to the Treaty of Waitangi, in which the Crown assumed
11 sovereignty (or *kawanatanga*) over New Zealand. The traditional authority that the
12 Crown confers upon the government of the day may be relatively slight, but it
13 remains of at least symbolic importance.

14 The physical absence of the person of the monarch has prevented an undue
15 emphasis upon personality, and encouraged the development of a more concep-
16 tual view of the Crown.¹⁴⁰ Whether this conception has become equivalent to and
17 subsumed into that of a State remains to be discovered. But it means that the con-
18 cept of the Crown remains important to the system of government in the United
19 Kingdom, New Zealand, Canada, Australia and similar countries, even if not all
20 aspects of its symbolism may apply.

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42 ¹³⁹ *The Legal Status of the Federal Administration* (n 65).

43 ¹⁴⁰ N Cox 'Republican Sentiment in the Realms of the Queen: The New Zealand Perspective' (2002)
29 Manitoba LJ 121.

